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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DONALD J. PAONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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52 pp

QUESTION PRESENTED

Whether co-conspirator declarations admitted into evidence under Federal Rule of Evidence 801(d)(2)(E) are nonetheless inadmissible where they fail to satisfy the reliability requirement of the Confrontation Clause of the Sixth Amendment and *Ohio v. Roberts,* 448 U.S. 56 (1980) or the "crucial" or "devastating" test of *Dutton v. Evans,* 400 U.S. 74 (1970).

Parties to the Proceeding

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Donald J. Paone, petitioner herein, and Anthony M. Colombo, Joseph R. Rossi, Thomas E. Marotta, Richard J. Marino, Rene Piccarreto and Samuel J. Russotti.

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OCTOBER TERM, 1985

DONALD J. PAONE,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Donald J. Paone respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Timbers, Meskill & Pratt, JJ.) (Appendix, *infra*, pp. 1a-22a) is reported at 782 F.2d 386.

Jurisdiction

The judgment of the Court of Appeals was entered on February 5, 1986. Petitions for rehearing and rehearing *en banc* were denied on March 19, 1986 and March 24, 1986 (Appendix, *infra*, pp. 23a-24a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rules 20.1 and 20.4 of the Rules of this Court.

Constitutional Provision and Rule Involved

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * *
>
> (2) * * * The statement is offered against a party and is * * * (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Statement of the Case

Petitioner was convicted after trial by jury before the United States District Court for the Western District of New York (Platt, J.) of participation in an enterprise conducted through a pattern of racketeering activity (18 U.S.C. §1962(c)) and conspiracy to participate in the affairs of such an enterprise (18 U.S.C. §1962(d)). He was sentenced to concurrent indeterminate terms of twenty years imprisonment. The conviction was affirmed by the United States Court of Appeals for the Second Circuit, *United States v. Paone*, 782 F.2d 386 (2d Cir. 1986) (Appendix, *infra*, pp. 1a-22a).

Indictment No. 82 CR 156, filed in the Western District of New York (Rochester) on November 8, 1982, charged ten defendants, among them Donald J. Paone, in two counts with substantive participation in an enterprise which was conducted through a pattern of racketeering activity and extortion, in violation of 18 U.S.C. §1962(c), and conspiracy to participate in the affairs of such an enterprise, in violation of 18 U.S.C. §1962(d). All defend-

ants were thus charged with violations of the respective substantive and conspiracy elements of the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

The gravamen of the indictment concerned a group of individuals alleged by the Government to be an enterprise in fact who were purportedly involved in extortion and other illegal enterprises in the Rochester area. In the earlier case of *United States v. Barton*, 647 F.2d 224 (2d Cir. 1981), the prosecution of an analogous group of individuals was described as:

> related to a series of bombings and attempted bombings in Rochester, New York, between November 1977 and June 1978, depicted as part of a struggle between rival individual factions to gain control of gambling and other unlawful enterprises in the Rochester area. The theory of the prosecution was that the [*Barton*] appellants represented one faction, seeking to unseat the rival group headed by one Salvatore Gingello. Gingello, who was released from jail in February 1978, was eventually killed when a bomb exploded under his car on April 23, 1978.
>
> 647 F.2d at 227.

The defendants indicted in the instant case were alleged by the Government in this indictment to be the supposed "rival group" alluded to in *Barton*. *Id.* at 227-228.

The evidence adduced at trial was presented largely through the testimony of alleged accomplices and co-conspirators of the defendants and concerned a purported enterprise whose principal predicate acts involved primarily the alleged extortion of various gambling clubs in the Rochester, New York, area over the period of September 1977 until the date of the indictment (November 8, 1982). Among the accomplices and co-conspirators whom the Government presented in its case in chief were such

participants in the criminal acts alleged as Angelo Monachino (Tr. 895-985), Anthony Oliveri (Tr. 2695-2940), Thomas Pelusio (Tr. 4153-4227), Thomas DiGiulio (Tr. 4921-4988) and Vincent Rallo (Tr. 5924-5980). Each of these accomplices and co-conspirators testified that they were presently receiving, or had received in the past, substantial consideration and benefits from the Government in exchange for their testimony. These benefits included, not surprisingly, federal and state immunity from prosecution for the activities testified to, prosecutorial and sentencing mitigation for many other collateral crimes committed by them, and financial support and relocation in the federal Witness Relocation Program for themselves and members of their families.

A. Co-Conspirator Declarations Admitted Without Proper Foundation and Determination of Reliability

Angelo Monachino's testimony, significantly, dealt not with the principal operative period of the indictment—1977 through 1979—wherein the various extortions, murders and attempted murders were alleged to have occurred, but, rather, with the murder of one Vincent James Massaro on November 23, 1973, by two individuals other than these defendants—Eugene DiFrancesco and Spike Lanovara—a murder in which Monachino admitted participating. Despite repeated defense objections to the fact that various of the alleged co-conspirator statements attributed to DiFrancesco and Lanovara both antedated the conspiracy proper and were not in furtherance of the 1977-1979 conspiracy proved at trial (Tr. 653-61; 887-91; 933; 937-47), the trial court overruled all objections to Monachino's testimony as to DiFrancesco's and Lanovara's statements relating to the murder (Tr. 1425-26).

Similarly, the testimony of Anthony Oliveri, a cooperating accomplice who admitted participation in the July 1978 Thomas Didio murder (Tr. 2851-67), as well as the March 1979 attempt to kill Angelo "Oskie" DiMarco

(2900-40), was replete with uncorroborated and unreliable alleged co-conspirator statements, many of which simply were narrative in nature and not in furtherance of the conspiracy. The gist of Oliveri's testimony concerned the period of September 1977 through the murder of Thomas Didio during July 1978. During the fall of 1977, Oliveri testified to having had several general discussions with co-conspirator Salvatore Gingello at Attica, Dannemora and Comstock prisons (Tr. 2710-12, 2718-20, 2737-39), with respect to the "organizations" in Rochester and previous events that had earlier transpired while Gingello was "away" in prison (*id.*). Objections to these conversations as narrative in nature, not in furtherance of the conspiracy and not properly among members of the conspiracy all were overruled (*id.*).

Noteworthy among the narrative conversations testified to by Oliveri was an April 1978 meeting purportedly held at the home of co-defendant Richard Marino, following the funeral of Gingello, who had been killed in a car bomb explosion several days earlier (Tr. 2766-71). According to Oliveri, the meeting was attended by various of the co-defendants in the instant case although he was directed to remain outside. After the two-hour meeting concluded and everyone left, he went inside and spoke with co-defendant Joseph Rossi, who purportedly informed him of the organization's new "assignments" in the wake of Gingello's death (Tr. 2766-71). Significantly, the witness admitted that having not attended the meeting in question, he was in no position to testify as to the participants in the conversation in question or, indeed, what actually was said at the meeting.*

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* The trial court, however, permitted the Government to introduce co-conspirator statements over objection even where multiple defendants were present and where the particular speaker could not be specifically identified (Tr. 2693-95).

These, of course, were not the only narrative hearsay statements testified to by Oliveri. Besides testifying to his 1977

(*footnote continued on following page*)

Indeed, among the most damaging narrative hearsay statements elicited by the Government were those testified to by co-conspirator-accomplice Thomas Pelusio, an alleged accomplice who candidly confessed to offering to perjure himself at a separate trial for the murder of John Fiorino, an alleged accomplice-informant (Tr. 4156). Pelusio, whose other crimes testimony with respect to running gambling operations constituted seriously prejudicial other crimes evidence, also testified to various co-conspirator statements that were not only outside the scope of the conspiracy charged but were also by no stretch of the imagination in furtherance of the conspiracy.

Among the non-conspiratorial conversations to which Pelusio testified were, *inter alia*, discussions with respect to running separate and unrelated gambling operations in 1975 with co-defendant Thomas Marotta, having nothing to do with the events of the instant indictment (covering ca. 1977-1979) (Tr. 4160, 4162, 4168, 4170, 4173-74), a similar conversation about an unrelated gambling venture with defendant Paone in 1976 (Tr. 4186) and an unrelated conversation with co-defendants' rivals Didio and Celestino--

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(*footnote continued from preceding page*)

prison conversations with Gingello, *supra*, as well as the April 1978 Rossi conversations, which he himself did not attend, Oliveri testified to narrative conversations recounted to him concerning a September 1977 barroom brawl at the Blue Gardenia restaurant involving several co-defendants and alleged rivals Thomas Didio, Dominic Celestino and Angelo Vaccaro (Tr. 2731-34); a narrative conversation concerning several defendants having earlier chased Celestino the previous night and the discovery of a pipe bomb (Tr. 2740-41); a narrative statement about the earlier wounding of alleged rival Rosario Chirico in May 1978 (Tr. 2806); and a co-conspirator statement (undated) about the earlier tracking of Thomas Didio to a rendezvous with his girlfriend (Tr. 3614). All statements allegedly made by co-conspirators that were not properly in furtherance of the conspiracy or corroborated by sufficient indicia of reliability were timely objected to and overruled. (*See, e.g.*, Tr. 2748-51, 2751-53, 2766-71, 2776, 2782-83, 2806-7, 2810-11, 2823-24, 2883, 3614).

conversations which could by no stretch of the imagination be deemed in furtherance of the conspiracy charged herein—which were admitted over objection at Tr. 4193-95, 4198-4200, 4200-02, 4203, 4208-11, 4211-12.

Several of the Pelusio co-conspirator declarations, moreover, were especially prejudicial, particularly since they were historical in nature and in no respect in furtherance of the conspiracy charged. Among them was a conversation conducted with several co-defendants in 1980—well over two years after Didio had been killed—in which one co-defendant commented in amazement that it had taken only one bullet to kill Didio and another commented that he wished he had been present [two years earlier] to watch Didio bleed to death (Tr. 4213-15). Objections to the admission of these conversations were overruled (*id.*). A similar objection was overruled to Pelusio's testimony as to "alleged" co-conspirator John Fiorino's belated statement that Oliveri had been a lookout for the Didio murder (Tr. 4217-19).* Clearly, these statements—uttered years after the events in question—could hardly be deemed made in furtherance of the conspiracy. Yet, the trial judge admitted them, nonetheless, merely because they were uttered among co-conspirators rather than during the course of, and in furtherance of, the conspiracy and with no independent inquiry as to the reliability or corrobora-

* Defense's objections to the admission of Fiorino's statement was premised not merely on the narrative nature of the hearsay statement but on the defense's colorable demonstration that, at the time the statement was made, Fiorino was no longer a co-conspirator but had turned Government informant and, thus, such statements were inadmissible as co-conspirator declarations (Tr. 4046-50, 4054-65). The trial court, however, subsequently ruled Fiorino a co-conspirator, not an informant *in this case*, despite the defense's colorable showing, after an *in camera* submission by the Government (Tr. 4963-75, 4986). The implication of the Government's statements, however, was that Fiorino *was indeed* an informant, albeit not in this case. All defense requests for a plenary hearing on the issue, however, were denied by the trial court.

tion of these second-hand hearsay statements, testified to by a cooperating accomplice.*

Similarly, the testimony of Thomas DiGuilio rendered Pelusio's testimony equally suspect. A self-confessed murderer who admitted having participated in the conspiracy to murder John Fiorino in December 1981 (Tr. 5021-22), he described Pelusio as a big coke dealer since 1981 who hated numerous of the defendants and was capable of lying and getting into serious fights with him (Tr. 5042-44, 5047, 5049)—testimony which, of course, corroborated Pelusio's own earlier admission that he was a self-confessed perjurer (Tr. 4156).

Despite defendants' repeated and timely objections that various of the statements allegedly made by non-testifying co-conspirators were not properly in furtherance of the conspiracy or corroborated by sufficient independent indicia of reliability, the trial court admitted virtually all of them (*See, e.g.*, Tr. 2748-51, 2751-53, 2766-71, 2776, 2782-83, 2806-7, 2810-11, 2823-24, 3614).

B. The Opinion of the Court of Appeals

The Court of Appeals for the Second Circuit affirmed the convictions (Appendix, *infra*, pp. 1a-22a). With respect to the admission of co-conspirator declarations (FRE 801(d)(2)(E)), the court took note of the fact that the Government presented its case primarily through the testimony of former members of the enterprise (*id.* at 6a). The court rejected defendants' contention that various statements antedated the conspiracy, finding that in light of the broad time-frame alleged by the indictment as to the duration of the enterprise (1971-1982), virtually all co-conspirator declarations occurred "during" the life of the

* Indeed, among the statements admitted over defendants' reliability objection were hearsay declarations attributed to John Fiorino that were uttered while he was intoxicated on cocaine (Tr. 4976-79; 4986)—statements that clearly were uttered under circumstances casting grave doubts about their competency or reliability.

enterprise, despite the fact that the vast majority of the trial evidence concerned events occurring only during the period of 1977 to 1979 (*id.* at 6a-7a). The court also rejected defendants' contention that various statements were not uttered "in furtherance" of the conspiracy (*id.* at 7a-9a). While conceding that some of the testimony "did cross the line," the court, in effect, held any such error harmless because of the protracted length of the trial (two and one-half months) (*id.* at 9a).

Finally, the court rejected defendants' contention that where co-conspirator declarations lack sufficient indicia of reliability and are "crucial" to the prosecution and "devastating" to the defense, their rights under the Confrontation Clause of the Sixth Amendment are violated (*id.* at 9a-11a). While conceding that where co-conspirator declarations are crucial or devastating, the court may be required to determine whether, in the circumstances of the case, the statement bears sufficient indicia of reliability, the court ruled that the simple determination that the declaration was in furtherance of the conspiracy ordinarily is sufficient to meet that test (*id.* at 9a-10a). Noting that this Court might well address the issue in the then-pending case of *United States v. Inadi*, 748 F.2d 812 (3d Cir. 1985), *cert. granted*, 105 S.Ct. 2653 (May 25, 1985), the court below "decline[d] appellants' invitation to require more support for a co-conspirator's statement than is required by [FRE] Rule 801(d)(2)(E)" (*id.* at 11a).

REASONS FOR GRANTING THE WRIT

The Co-Conspirator Declarations Admitted in the Instant Case Lacked Independent Indicia of Reliability and Were Crucial to the Prosecution and Devastating to the Defense.

This is a case ideally suited to Supreme Court review. It presents the precise question recently reserved by this Court in *United States v. Inadi*, 106 S.Ct. 1121, 1124-25 n.

3 (March 10, 1986)—whether co-conspirator declarations admitted into evidence under Federal Rule of Evidence 801(d)(2)(E) may nonetheless be inadmissible where they fail to satisfy the reliability requirement of the Confrontation Clause of the Sixth Amendment and *Ohio v. Roberts*, 448 U.S. 56 (1980) or the "crucial" or "devastating" test of *Dutton v. Evans*, 400 U.S. 74 (1970). As Justice White noted in his dissent from the denial of certiorari in *Sanson v. United States*, 104 S.Ct. 3559, 3559-60 (June 25, 1984) (White, J., dissenting from the denial of certiorari), the circuits are evenly divided on the question of whether co-conspirator statements that satisfy the requirements of FRE 801(d)(2)(E) necessarily satisfy the requirements of the Confrontation Clause, without more, or whether a case-by-case inquiry into reliability is required.* *See also United States v. Inadi*, 106 S.Ct. at 1129-30 n. 1 (Marshall & Brennan, JJ., dissenting) (noting the conflict among the lower courts on this question and collecting cases). It is

* The First, Fourth, Fifth and Seventh Circuits have held that the requirements of FRE 801(d)(2)(E) are identical to the requirements of the Confrontation Clause. *See Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981); *United States v. Peacock*, 654 F.2d 339, 349-50 (5th Cir. 1981); *United States v. Sanson*, 727 F.2d 1113 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 3559 (1984) (White, J., dissenting from the denial of certiorari).

On the other hand, the Third, Eighth and Ninth Circuits have held that the requirements of the Federal Rules of Evidence and the Confrontation Clause are not identical and that courts must assess the circumstances of each case to determine whether the statements carry sufficient indicia of reliability. *See United States v. Caputo*, 758 F.2d 944, 951-52 (3d Cir. 1985) (collecting cases); *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir. 1983); *United States v. DeLuna*, 763 F.2d 897, 909-11 (8th Cir. 1985); *United States v. Massa*, 740 F.2d 629, 638-40 (8th Cir. 1984) (collecting cases); *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983).

The Second Circuit has been thoroughly inconsistent in its application of *Roberts* and *Dutton*. On some occasions, it has held that a statement that fits within a "firmly-rooted" hearsay

(*footnote continued on following page*)

respectfully submitted that the time has come to address "the substantial confusion surrounding this frequently recurring issue" (104 S.Ct. at 3560) and to resolve it once and for all.

A. The Co-Conspirator Declarations Failed to Satisfy The Confrontation Clause's Reliability Requirement

Irrespective of whether the co-conspirator statements admitted in the instant case qualified under the statutory requirements for admissibility of FRE 801(d)(2)(E), it is submitted that they nonetheless failed to meet the separate independent indicia of reliability requirement of the Confrontation Clause of the Sixth Amendment as enunciated by this Court in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). As noted in *Roberts*, even if a hearsay statement is otherwise admissible, in order to satisfy the requirement of the Confrontation Clause, the prosecution must nonetheless demonstrate that the declarant is unavailable and that the statement bears sufficient indicia of reliability.* *United States v. DeLuna*, 763 F.2d at 909; *United States v. Massa*, 740 F.2d at 638-39; *United States v. Ammar*, 714 F.2d at 254-57. *Roberts* held that (448 U.S. at 66):

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavail-

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(*footnote continued from preceding page*)

exception ordinarily satisfies Sixth Amendment concerns, while, on other occasions, it has held that a higher standard of reliability must be met where the statement is "crucial" to the prosecution's case. *Compare United States v. Puco*, 476 F.2d 1099, 1107 (2d Cir. 1973); *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978); *United States v. Perez*, 702 F.2d 33, 37 (2d Cir. 1983) *with United States v. Stratton*, 779 F.2d 820, 829-30 (2d Cir. 1985) and the opinion below (Appendix, *infra*, pp. 9a-11a).

* While this Court has recently determined that a showing of the declarant's unavailability ordinarily is not required where the statement sought to be admitted is a co-conspirator declaration, it nonetheless made clear that it was not addressing the separate reliability requirement of *Roberts*. *United States v. Inadi*, 106 S.Ct. at 1124-25 n. 3.

> able. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

In the instant case, despite giving lip service to the *Roberts* requirement that hearsay declarations must nonetheless have independent indicia of reliability, the court below ruled simply that it "decline[d] appellant's invitation to require more support for a co-conspirator's statement than is required by [FRE] Rule 801(d)(2)(E)" (Appendix, *infra,* p. 11a). This was clear error. In so ruling, the court below conveniently elided over the fact that co-conspirator declarations lack the customary indicia of trustworthiness that accompany recognized exceptions to the hearsay rule under the Federal Rules of Evidence. Indeed, as the Third Circuit commented recently:

> Because co-conspirator admissions lack the "special trustworthiness" that characterizes most admissible hearsay, we refused in *Ammar* . . . to carve out an exception to the *Roberts* "reliability" requirement.

United States v. Caputo, 758 F.2d at 950-52 & n. 2 (collecting cases upholding *Roberts* reliability requirement).

As the Eighth Circuit noted in precisely this context in *United States v. Massa,* 740 F.2d at 639:

> Nor is there any reason to specifically exclude coconspirator statements from [*Ohio v.*] *Roberts* requisite showing of unavailability and reliability. While it is true that *Roberts* specifically addressed hearsay *exceptions,* the same interest in face-to-face confrontation is at stake when the out-of-court statements of coconspirators are admitted as *non-*

> *hearsay* under the agency theory of Fed.R.Evid. 801(d)(2)(E). Indeed, coconspirator statements may be more in need of scrutiny under the confrontation clause precisely because, unlike hearsay exceptions, they are not admissible because of their inherent reliability. *See United States v. Ammar,* 714 F.2d 238, 255-256 (3d Cir.); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv.L.Rev. 1378, 1385-1391 (1972).
>
> * * *
>
> Initially, we note that the coconspirator rule is not "a firmly rooted hearsay exception" from which "reliability can be inferred without more." *See Ohio v. Roberts, supra,* 448 U.S. at 66. The Federal Rules of Evidence categorize coconspirator statements along with admissions as "[s]tatements which are not hearsay." Fed.R.Evid. 801(d)(2). Admissions are not admitted because of confidence in their inherent reliability; rather, they are admitted because "a party will not be heard to object that s/he is unworthy of credence." *United States v. Ammar, supra,* 714 F.2d at 255; McCormick, *Handbook of the Law of Evidence* § 262 at 628-629 (2d ed. 1972). Thus, the confrontation clause inquiry is not equivalent to the Rule 801 inquiry.

The Third Circuit has explained the lack of congruence between the Federal Rules of Evidence and the Confrontation Clause in the following terms:

> If there is no assumption that a coconspirator statement is *per se* trustworthy, a Rule 801 inquiry cannot be viewed as necessarily equivalent to a Confrontation Clause inquiry. It must be separately ascertained whether coconspirator statements sought to be admitted are attended by adequate assurances of reliability. As the Court stated in *California v. Green,* 399 U.S. 149, 155

> (1970), the evidentiary rules and the Confrontation Clause "are generally designed to protect similar values" but the overlap is not complete. Statements which satisfy one may not satisfy the other. We cannot, as the government would have us do, abdicate our responsibility to preserve constitutional values to the rule writers, whether federal or state.

United States v. Ammar, 714 F.2d at 256.

Clearly, applying a reliability analysis under the Confrontation Clause, the co-conspirator statements admitted here were totally devoid of the corroboration and absence of motive to fabricate that are deemed the hallmarks of accuracy and probity. *See United States v. White,* 553 F.2d 310, 313-14 (2d Cir. 1977) (Friendly, J.) (the degree to which a statement is corroborated is a significant factor in the weight which may be attached to it).

In analyzing the reliability of the statements tendered here, it is significant to note the utter lack of corroboration of the accomplice-witnesses' testimony and the strong motives that the witnesses had to lie, both as to their participation during the conspiracy as well as their purposely inculpatory testimony during the trial.

The danger of co-conspirator fabrication, indeed, has long been recognized as particularly pernicious:

> [T]he members of a conspiracy might incriminate other individuals either because of revenge or mistake. Furthermore, the conspiracy situation may provide strong motivation to fabricate with regard to the involvement of innocent parties if the claim of their participation would further the group's ends.

Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence,* 113 U. Pa. L. Rev. 741, 755-56 (1965). *See* Davenport, *The Confrontation Clause*

and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1396 (1972); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule,* 52 Mich. L. Rev. 1159, 1165-66 (1954) ("conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members)"); *cf.* 4 *Weinstein's Evidence,* ¶801(d)(2)(E) [01] at 801-235 (1984 rev.) (defendants need protection against the "idle chatter of criminal partners as well as inadvertently misreported and deliberately fabricated evidence").

Moreover, the testimony of accomplice-co-conspirator witnesses is recognized by the courts to be notoriously untrustworthy and warranting the strictest scrutiny. Indeed, as was noted in *United States v. Oliver,* 626 F.2d 254, 261 (2d Cir. 1980) in an analogous context:

> Statements given by a person held in custody, which implicate others, must be viewed with the same strict scrutiny that applies in weighing accomplice testimony.
>
> * * *
>
> His statement may thus have been motivated in part by the prospect of severe punishment for his crime if he did not cooperate and the desire to gain favor with the Government in the hope of obtaining release or reduced punishment. While his statement may also have been truthful, these other factors could have influenced him to incriminate Cooper.

In a recently-published and exhaustively researched analysis of the intersection of the co-conspirator declaration rule with the Confrontation Clause, one commentator has taken particular note of the fact that Rule 801(d)(2)(E)—and most triers of fact—fail to properly take into account the dubious reliability of co-conspirator declarations and the extraordinary caution with which they must be analyzed as a

preliminary matter in order to evaluate whether they should be admitted into evidence in the first instance:

> When measuring the reliability of coconspirator statements in terms of sincerity, ambiguity, perception and memory, it becomes obvious that the coconspirator statement is not "firmly rooted." Because they have a special incentive to shift blame to one another, coconspirators are likely to bend the truth of their statements. They are also likely to speak in code words or names that make the identification of their meaning or subject matter ambiguous. Because the nature of conspiracy requires sharing of information only on a "need-to-know" basis, a coconspirator may be unaware of facets of a conspiracy beyond his own particular role, and may misperceive the roles of others. Only the memory factor of reliability is somewhat ensured by Rule 801(d)(2)(E), because the rule requires that the statement have been made during the course of the conspiracy. Given the large potential for faulty perception, however, even accurate memory is no guarantee of reliability.

Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 Fordham Law Rev. 1291, 1311-12 (1985) (and cases collected therein).

Here, of course, despite repeated objections, no independent inquiry was made by the trial judge at the time that the statements were proffered in order to determine the *reliability* and *trustworthiness* of the statements under the Confrontation Clause. Indeed, the trial judge in the instant case was so inundated by the sheer welter of hearsay produced by the Government that he simply admitted everything "subject to connection," but with little or no independent inquiry as to the *reliability* of the statements, irrespective of whether they satisfied the "in furtherance" requirement of Rule 801(d)(2)(E) (*See, e.g.*, Tr. 5957-70,

5980).* Particularly in a case such as this, where the accomplice-witnesses who testified were self-confessed perjurers with admitted animus against various of the defendants, the trial court's failure to conduct a more exhaustive "reliability" inquiry was prejudicial error.

Indeed, under analogous circumstances, the Eighth Circuit found the admission of an accomplice's co-conspirator declarations to have violated the reliability prong of the Confrontation Clause even though technically admissible under Rule 801(d)(2)(E):

> Although Brimberry's out-of-court statements were made from personal knowledge and in furtherance of the conspiracy and were corroborated by other evidence, we agree with the defendants that Brimberry's behavior after the scheme was discovered casts doubt on the reliability of any of his statements.
>
> * * *
>
> Brimberry's penchant for lying no matter what was at stake, may be the type of unusual circumstance which would require the exclusion of his out-of-court statements under the confrontation clause despite their admissibility under Rule 801(d)(2)(E).

United States v. Massa, 740 F.2d at 640.

The same result should obtain in this case. The trial court's failure to conduct a properly exhaustive and contemporaneous "reliability" inquiry into the trustworthiness of the co-conspirator declarations testified to by various of the accomplice-witnesses—witnesses of admittedly dubious credibility under the best of circumstances—denied defend-

* Indeed, the Court of Appeals implicitly conceded that "some of the informants' testimony did cross the line" (Appendix, *infra*, p. 9a), but, without particularized analysis, implicitly found such error harmless over the course of a two and one-half month trial (*id.*).

ant his right to proper confrontation under the Sixth Amendment. On that basis alone, certiorari should be granted.

B. The Co-Conspirator Declarations Violated The "Crucial/Devastating" Test of *Dutton*

In addition to various co-conspirator declarations having been admitted into evidence in the absence of the requisite reliability analysis, the statements suffer from yet an additional vice—they were "crucial" to the prosecution's case and "devastating" to the defense. Accordingly, their admission could in no respect have been deemed harmless error under this Court's analysis in *Dutton v. Evans*, 400 U.S. 74 (1970).

In rare instances, this Court has held that the admission without cross-examination of hearsay testimony of a non-testifying declarant did not violate the accused's Sixth Amendment right of confrontation. *Dutton*, 400 U.S. at 91. In each such instance, however, there was an abundance of independent evidence of the statement's reliability and, in *Dutton*, this Court noted that the hearsay was not "crucial" to the prosecution or "devastating" to the defense. 400 U.S. at 87. *See, in accord, United States v. Puco*, 476 F.2d at 1103 (statement admissible where clearly trustworthy and not "crucial" to the prosecution or "devastating" to the defense). *Dutton*, of course, considered the Confrontation Clause in a case involving the admission of co-conspirator hearsay under a state statute drawn more broadly than Rule 801(d)(2)(E). The plurality held that no confrontation violation occurred because the statement was neither "crucial" nor "devastating" and was "of peripheral significance at most." 400 U.S. at 87.

In its discussion of the "crucial" or "devastating" test, the Fordham Note cited above surveyed in exhaustive detail the history of the *Dutton* test in this Court's jurisprudence (53 Fordham L. Rev. at 1327-28 n. 210) and concluded that even where the reliability prong of the

Confrontation Clause is met, the "crucial" or "devastating" test is *still* constitutionally mandated:

> In cases in which the declarant is truly unavailable, such as when he is deceased, the necessity of admitting the declarant's statement into evidence becomes a more important factor in determining whether or not to admit the out-of-court statement. Accordingly, with sufficient independent evidence of a conspiracy, those rare coconspirator statements that are reliable should be admitted if the declarant is unavailable. Even in the unusual case of a deceased declarant and a somewhat reliable coconspirator statement, however, the evidence should not be admitted if it is crucial to the prosecutor's case or devastatingly prejudicial to the defendant. Convictions based predominantly on hearsay testimony should be eschewed because, at the very least, the confrontation clause ensures that a defendant's conviction will not be wholly based on evidence that has not been confronted. *Dutton's* crucial or devastating inquiry should therefore represent an outer boundary, barring the prosecutor from using statements of unavailable declarants that are crucial to its case or that have a devastatingly prejudicial effect on the defendant.

Note, 53 Fordham L. Rev. at 1327 & n. 210 (cases collected and discussed therein analyzing the history of the "crucial" or "devastating" test).

Here, both prongs of the *Dutton-Puco* test were violated. The Government introduced no convincing independent indicia of reliability as to the details of the co-conspirator-accomplices' testimony. Indeed, cross-examination revealed them to be self-confessed murderers, perjurers and narcotics addicts who were testifying purely and simply in order to "feather their nests" with the Government in disposing of other equally serious charges against them. Secondly, it

cannot be gainsaid but that the uncorroborated testimony of these witnesses was both "crucial" to the prosecution and "devastating" to the defendants. And, finally, numerous of the actual co-conspirator declarations themselves, and the factual circumstances of their utterance, cast long shadows on their trustworthiness, accuracy and reliability. *See, e.g.*, various of the hearsay statements attributed to John Fiorino, uttered while he was intoxicated on cocaine (Tr. 4976-79). Objections to these statements on reliability grounds were overruled (Tr. 4986).

Thus, the co-conspirator declarations and accomplice testimony admitted at the instant trial were no mere gloss added to "fill in the gaps" in the prosecution's case. To the contrary, they were the *entirety* of the Government's case. If ever the uncorroborated co-conspirator and accomplice declarations were "crucial" to the prosecution *and* "devastating" to the defense, this is that case. The Government's entire proof was made out through the testimony of Angelo Monachino, Anthony Oliveri, Thomas Pelusio, Thomas DiGiulio and Vincent Rallo. Each of them testified to innumerable statements made by various co-conspirators in the alleged extortion conspiracy. Indeed, it would be fair to state that it is questionable whether the Government could even have made out a *prima facie* case against the defendants in the absence of these witnesses' largely uncorroborated testimony with respect to co-conspirator declarations. Accordingly, under the *Dutton* test, it is clear that the co-conspirator declarations in this case were "crucial" and "devastating." Perforce, they should not have been admitted into evidence and the error in so admitting them, given their all pervasive nature, was of constitutional proportions.

Accordingly, both because the Government's accomplice-witnesses' testimony (a) lacked sufficient indicia of reliability under the Confrontation Clause and *Ohio v. Roberts* and (b) was both "crucial" and "devastating" under the

standard of *Dutton v. Evans,* defendant's constitutional rights clearly were violated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 16, 1986

Respectfully submitted,

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 472, 473, 490, 491, 492, 493, 494
August Term 1985

(Argued December 16, 1985 Decided February 5, 1986)

Docket Nos. 84-1454, 84-1466, 84-1467
84-1468, 84-1469, 84-1470, 84-1471

UNITED STATES OF AMERICA,

Appellee,

—v.—

DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE HOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARRETO, and SAMUEL J. RUSSOTTI, a/k/a "RED",

Defendants-Appellants.

Before:

TIMBERS, MESKILL and PRATT,

Circuit Judges.

Appeals from judgments of conviction entered December 17 and 21, 1984, in the Western District of New York, Thomas C. Platt, Jr., *District Judge*, sitting by designation, after a two and one-half month jury trial, convicting appellants of racketeering and racketeering conspiracy in the Rochester, New York, area, in violation of RICO and conspiracy to violate RICO. 18 U.S.C. §§ 1962(c) and 1962(d) (1982).

Affirmed.

WILLIAM C. BRYSON, Attorney, Department of Justice, Washington, D.C. (Salvatore R. Martoche, United States Attorney, Western District of New York, Buffalo, N.Y.; Douglas E. Rowe and Charles B. Wydysh, Attorneys, Department of Justice, Washington, D.C., on the brief), *for appellee.*

EDWARD M. CHIKOFSKY, New York, N.Y. (James M. LaRossa, Paul B. Bergman, and LaRossa, Cooper, Axenfeld, Mitchell and Bergman, New York, N.Y.; John F. Speranza, Rochester, N.Y., on the brief), *for appellant Paone.*

ROBERT M. MURPHY, Buffalo, N.Y. *for appellant Colombo.*

HERBERT L. GREENMAN, Buffalo, N.Y. (Palmer, Greenman and Hurley, Buffalo, N.Y., on the brief), *for appellant Rossi.*

JOSEPH M. LA TONA, Buffalo, N.Y. (Condon, La Tona and Pieri, Buffalo, N.Y., on the brief), *for appellant Marotta.*

PAUL J. CAMBRIA, Jr., Buffalo, N.Y. (Rochelle A. Reback, and Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., on the brief), *for appellant Marino.*

HAROLD J. BOREANAZ, Buffalo, N.Y. (Boreanaz, Baker & Humann, Buffalo, N.Y., on the brief), *for appellant Piccarreto.*

JOHN F. HUMANN, Buffalo, N.Y. (Boreanaz, Baker & Humann, Buffalo, N.Y., on the brief), *for appellant Russotti.*

TIMBERS, *Circuit Judge*:

Appellants Donald J. Paone, Anthony M. Colombo, Joseph R. Rossi, Thomas E. Marotta, Richard J. Marino, Rene Piccarreto, and Samuel J. Russotti appeal from judgments of conviction entered December 17 and 21, 1984 in the Western District of New York, Thomas C. Platt, Jr., *District Judge*, sitting by designation.

Following a two and one-half month jury trial, appellants were found guilty of substantive violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and of conspiracy to violate RICO, 18 U.S.C. §§ 1962(c) and 1962(d) (1982). Three of appellants' co-defendants were acquitted by the jury. The district court

sentenced each appellant to twenty years imprisonment on each of the two counts upon which they were convicted. Sentences were ordered to run consecutively for appellants Russotti, Piccarreto, Marino, Rossi, and Colombo. For appellants Marotta and Paone, the sentences were ordered to run concurrently.

We find that the principal issues raised on appeal which warrant discussion in this opinion are (1) whether the admission of co-conspirators' statements at the trial violated the Federal Rules of Evidence or the confrontation clause of the Sixth Amendment; (2) whether appellant Marotta was denied his right to conflict-free counsel because his retained lawyer had represented a government witness seven years earlier; (3) whether the New York corroboration of accomplice testimony requirement is incorporated in a RICO prosecution; and (4) whether the testimony of a Rochester policeman, which the court eventually struck, was so prejudicial as to require a reversal. Other subordinate claims are raised.

Several appellants have adopted by reference points raised in the briefs of their co-appellants pursuant to F.R.A.P. 28(i).

For the reasons set forth below, we affirm the judgments of conviction of each appellant upon each count upon which he was convicted.

I.

We summarize only those facts believed necessary to an understanding of the principal issues raised on appeal.

Appellants' convictions arose from their participation in the conduct of a criminal enterprise in the Rochester,

New York, area during an eleven year period. The indictment charged that between February 1971 and November 1982 appellants participated in a racketeering enterprise that extorted funds from gambling operations, and tried to prevent a rival group from encroaching on its control over gambling activities.

The predicate acts underlying the RICO charge encompassed a variety of serious offenses, including: the murder of Vincent Massaro; the murder of Thomas Didio; the attempted murders of rival leaders; attempted arson, extortion, and obstruction of justice. Former members of the enterprise testified on behalf of the government regarding these offenses and about appellants' positions in the crime organization. Testimony disclosed that, before gambling joints could operate in the Rochester area, permission had to be obtained from the organization. The gambling clubs paid the organization between $400 and $1800 each week, even though the organization did not provide services to the clubs.

One of the predicate acts included in this RICO indictment was the 1973 murder of Vincent Massaro. In 1977 appellants Russotti, Piccarreto, Marino and Marotta were convicted of this offense in the New York Supreme Court for Monroe County. After they began serving their sentences, it was discovered that sheriff's deputies had committed perjury during the trial. On motion of the Monroe County District Attorney, the judgment was vacated, the indictment was dismissed, and these four appellants therefore were released. During their limited incarceration, disputes arose over the leadership of the organization. Some members were expelled from the organization. A rival group vied for control over the gambling operations. This "war between the factions" led to the murder

of rival Thomas Didio, the attempted murder of Rosario Chirico, the attempted murder of Sonny Celestino, and the attempted arson of Chirico's place of business. The activities of this rival group are described in our opinion in *United States* v. *Barton*, 647 F.2d 224, 228-29 (2 Cir.), *cert. denied*, 454 U.S. 857 (1981).

There of course was a great deal of other evidence, some of which we shall refer to in our discussion of the principal claims of error which follows.

II.

The government presented its case primarily through the testimony of former members of the enterprise. Appellant Paone claims that a number of co-conspirator statements concerning the activities of the enterprise were admitted in violation of the Federal Rules of Evidence and the confrontation clause of the Sixth Amendment. We disagree.

Under Fed. R. Evid. 801(d)(2)(E), a statement does not constitute hearsay if it is "offered against a party" and is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Appellant asserts that the court allowed government witnesses to testify about statements which did not comply with the timing element that a statement be made "during" the conspiracy and the motive element that a statement be "in furtherance" of the conspiracy.

Appellant's claim that the court should not have admitted such statements under Rule 801(d)(2)(E) because they were not made "during" the conspiracy rests on the erroneous premise that the indictment related only to

criminal conduct which occurred after 1978. The indictment, however, sets forth acts beginning as early as 1971. The RICO indictment centered on appellants' conduct in extorting funds from gambling houses in Rochester. The predicate acts can be traced readily to this criminal design. Vincent Massaro was killed because of his disobedience and his displeasure with his share of the proceeds from the racketeering activity. Also, the rift within the organization, which led to the murders and attempted murders of rival group leaders, erupted during the incarceration of the Massaro murder participants. The gambling houses provided the funds for the operation of the enterprise. Statements made before 1977 relating to the collection of these funds clearly were made during and in furtherance of the conspiracy. We cannot say that the conspiracy began as late as 1977. We therefore reject the claim that the 1973 Massaro murder and the gambling operations antedated the conspiracy.

We also are not persuaded that the "in furtherance" requirement is as stringent as appellant urges.

Appellant points to portions of the testimony of government witness Thomas Pelusio as examples of narrative testimony that did not comply with the "in furtherance" requirement of Rule 801(d)(2)(E). Pelusio testified about a conversation concerning the Didio murder, a conversation in which he and some appellants participated. One appellant was reported as commenting on the manner in which Didio was killed, stating that it took only one bullet. Another appellant was reported as saying he wished that he had been present to watch Didio bleed. Other claims of error are based on the admission of testimony relating to 1975 and 1976 gambling operations and the 1973 Massaro murder.

To begin with, in order to comply with the "in furtherance" requirement, there must be evidence that establishes the conspiracy and that the defendant participated in it. 4 Weinstein & Berger, Weinstein's Evidence § 801(d)(2)(E)[01], at 801-244 (1985); *United States* v. *Lieberman*, 637 F.2d 95, 102 (2 Cir. 1980); *United States* v. *Lyles*, 593 F.2d 182, 194 (2 Cir.), *cert. denied*, 440 U.S. 972 (1979). We are satisfied that the participation of each appellant in the instant conspiracy was established. Once a conspiracy is shown to exist, the "evidence sufficient to link another defendant to it need not be overwhelming." *United States* v. *Provenzano*, 615 F.2d 37, 45 (2 Cir.), *cert. denied*, 446 U.S. 953 (1980) (quoting *United States* v. *Head*, 546 F.2d 6, 9-10 (2 Cir. 1976), *cert. denied*, 430 U.S. 931 (1977)).

Appellant also asserts that the narrative descriptions by the government witnesses did not satisfy the "in furtherance" requirement. In *United States* v. *Birnbaum*, 337 F.2d 490, 495 (2 Cir. 1964), we recognized that mere idle chatter will not satisfy what is now Rule 801(d)(2)(E). Frequently, however, such statements may be admitted as declarations against penal interest, *Lieberman*, *supra*, 637 F.2d at 103, or under the state of mind exception to the hearsay rule. *United States* v. *Cicale*, 691 F.2d 95, 103-05 (2 Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). We also have recognized that the "in furtherance" requirement of Rule 801(d)(2)(E) is satisfied when a co-conspirator is apprised of the progress of the conspiracy, or when the statements are designed to induce his assistance. *United States* v. *Perez*, 702 F.2d 33, 37 (2 Cir.), *cert. denied*, 462 U.S. 1108 (1983); *United States* v. *Mangan*, 575 F.2d 32, 44 (2 Cir.), *cert. denied*, 439 U.S. 931 (1978). In light of those principles, we are satisfied that there was no error here.

Even if some of the informants' testimony did cross the line, appellant has not convinced us that the instant trial was tainted by any such testimony that might not have comported with Rule 801(d)(2)(E). This trial extended over a period of two and one-half months. In a trial of this length, we are mindful that the chance that a single error, assuming arguendo that such did occur, would be significant enough to cause reversal or mistrial is not as great as appellants would have us believe. "Experience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *United States* v. *Jones*, 766 F.2d 994, 1004 (6 Cir. 1985) (quoting *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 227 (6 Cir. 1982), *cert. denied*, 461 U.S. 929 (1983)).

In addition to his claim under Rule 801(d)(2)(E), appellant asserts that the admission of hearsay statements of co-conspirators violated his rights under the confrontation clause. The statements, according to appellant, did not contain sufficient indicia of reliability. Where co-conspirators' statements are so "crucial" to the prosecution and "devastating" to the defense, according to appellant, the confrontation clause is violated. We do not agree.

In *United States* v. *Puco*, 476 F.2d 1099, 1107 (2 Cir.), *cert. denied*, 414 U.S. 844 (1973), in commenting on a petition for rehearing, the Court made clear that, "[W]e did not and do not hold that a trial judge must find, before admitting a co-conspirator's declaration, that it is not 'crucial' to the Government's case or 'devastating' to the defense." The Court also stated:

> "For future applications of *Dutton* [v. *Evans*, 400 U.S. 74 (1970)] to similar situations, we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any cross-examination. . . . In most cases the determination that a declaration is in furtherance of a conspiracy—a determination that the trial judge now must make in every case for admissibility—will decide whether sufficient indicia of reliability were present."

Id. at 1107 (footnote omitted). We also have recognized that "a higher standard of reliability is imposed if the hearsay statements are 'crucial' to the Government's case". *United States* v. *Stratton*, Nos. 84-1441, -1459, -1460, -1463, -1365, slip op. 6887, 6905 (2 Cir. Dec. 13, 1985) (citing *Dutton* v. *Evans*, 400 U.S. 74 (1970)). As the *Puco* court indicated, however, the cases in which the requirements of the hearsay rule do not provide sufficient indicia of reliability to satisfy the confrontation clause will be rare. *Id.* at 1107-08. "This is true because a declaration in furtherance of a conspiracy would be against the penal interest of the declarant." *United States* v. *Perez*, 702 F.2d 33, 37 (2 Cir.), *cert. denied*, 462 U.S. 1108 (1983). *See also United States* v. *Wright*, 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied*, 440 U.S. 917 (1979) (facts did not support departing from general rule that statements in furtherance of conspiracy contain sufficient indicia of reliability to satisfy confrontation clause).

In our view, the facts of the instant case do not warrant our departing from our earlier decisions. We decline appellant's invitation to require more support for a co-conspirator's statement than is required by Rule 801(d)(2)(E). We hold that the admission of co-conspirator's statements did not violate the confrontation clause.

We acknowledge that the Supreme Court may address the issue of whether out-of-court statements must be addressed separately under the hearsay rules and the confrontation clause. The question appears to be presented in *United States* v. *Inadi*, 748 F.2d 812 (3 Cir. 1985), No. 84-1580, *cert. granted*, 105 S. Ct. 2653 (May 25, 1985).

Appellant's third attack on the admission of co-conspirator declarations is his claim that the court made an inadequate *Geaney* finding. Under *United States* v. *Geaney*, 417 F.2d 1116 (2 Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), where hearsay evidence in the form of a co-conspirator statement is admitted "subject to connection", the court must determine, when all the evidence has been received, whether the prosecution "has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence, independent of the hearsay utterances." 417 F.2d at 1120.

Appellant asserts that the court was required to make a specific determination with respect to each defendant as to when he joined the conspiracy and the exact non-hearsay evidence that tied him to the conspiracy. There is no such requirement. In *United States* v. *Perez*, *supra*, 702 F.2d at 36, we held that "an implicit *Geaney* ruling can be inferred in the trial judge's decision to receive the evi-

dence and to deny a directed verdict of acquittal on the conspiracy charge." Here, the court made a finding that each defendant was a member of the charged conspiracy. There was abundant evidence linking each defendant to the conspiracy. This is sufficient under both *Geaney* and *Perez*.

We hold that the court correctly admitted the co-conspirators' statements.

III.

Several former members of the conspiracy testified on behalf of the government. Midway through the trial, government witness Monachino, a former member of the enterprise, disclosed on cross-examination that in 1975 attorney Richard Miller, who was representing appellant Marotta at the instant trial, had represented him, Monachino, in obtaining bail when Monachino was arrested on unrelated charges in 1975. Marotta thereupon requested that Miller be discharged as his attorney in the instant case. Marotta sought permission to retain new counsel. The court denied both requests after conducting an exhaustive colloquy with Monachino. Marotta claims that, since his retained attorney, seven years earlier, had represented a government witness who was testifying against Marotta in the instant case, his Sixth Amendment rights were violated. Marotta asserts that the disclosure that the same attorney at widely separated times had represented two men, each of whom was a member of the alleged conspiracy, so prejudiced the proceedings as to require a reversal and new trial. We disagree.

While a defendant has a right to counsel of his choice under the Sixth Amendment, it is not an absolute right.

United States v. *Ostrer*, 597 F.2d 337, 341 (2 Cir. 1979). *See In Re Grand Jury Subpoena Served Upon John Doe, Esq. (SLOTNICK)*, ____ F.2d ____, ____ (2 Cir. 1986), slip op. 6975, 6998 (Jan. 9, 1986). Absent a conflict of interest, a defendant in a criminal case does not have the unfettered right to retain new counsel, particularly after trial has commenced. In determining whether to allow a defendant to retain new counsel, the court must consider whether a severance would then be required, the risks and problems associated with the delay, and whether substitutions would disrupt the proceedings and the administration of justice. *McKee* v. *Harris*, 649 F.2d 927, 931 (2 Cir. 1981), *cert. denied*, 456 U.S. 917 (1982).

We recognize that a defendant in a criminal case is entitled to conflict-free representation. *Cuyler* v. *Sullivan*, 446 U.S. 335, 349-50 (1980). For the reasons set forth below, however, we find that, if there was any conflict in the instant case, it was abated during the trial.

First, the government did not realize that attorney Miller previously had represented Monachino until the day before Monachino testified. Miller's representation of Monachino had been ten years earlier and was very limited. Miller had shared office space with Monachino's retained lawyer and merely had aided him in applying for bail. Monachino's need for legal representation at that time stemmed from criminal charges wholly unrelated to the instant case. Miller had not represented Monachino in any way since 1975. Second, Monachino waived any attorney-client privilege he had. As Marotta concedes, Miller subjected Monachino to a "disastrous" cross-examination. Third, following a detailed inquiry into the extent of the relationship between Monachino and Miller, the court carefully informed the jury of the limited nature

of the prior representation. The court also explained to the jury that there was a limited universe of criminal defense lawyers in the geographic region and that such past representation was not unusual.

The situation here was not nearly as problematic as in the cases which appellant cites where we held that a defendant was denied his right to effective assistance of counsel. *E.g.*, *United States* v. *Cancilla*, 725 F.2d 867, 870 (2 Cir. 1984) (attorney who had engaged in similar criminal conduct lacked incentive to conduct a vigorous defense); *Solina* v. *United States*, 709 F.2d 160, 167-69 (2 Cir. 1983) (defendent represented by unlicensed attorney).

Particularly in light of the trial court's careful instruction to the jury, Monachino's waiver of the attorney-client privilege, and the absence of any prejudice to Marotta, we hold that the court ruled correctly in refusing to allow Marotta to discharge his trial counsel and to retain new counsel midway through the trial that lasted two and one-half months.

IV.

Six of the predicate acts underlying the RICO indictment were New York state law offenses of murder, attempted murder and attempted arson. Appellant Marino claims that, since New York state law requires corroboration of accomplice testimony to prove these offenses, such acts did not comply with the definition of "racketeering activity" under RICO. We disagree.

The RICO statute, 18 U.S.C. § 1961(1)(A) (1982), defines "racketeering activity" as "any act or threat involving murder, kidnaping, gambling, arson, robbery,

extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year". (emphasis added). Appellant claims that, if an accused cannot be charged in the New York state courts for these offenses in the absence of accomplice testimony corroboration, he cannot be charged under the federal RICO statute. The court overruled appellant's claim in this respect at the close of the government's case and during the pre-charge conference.

We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge. *United States* v. *Licavoli*, 725 F.2d 1040, 1047 (6 Cir.), *cert. denied*, 104 S. Ct. 3535 (1984). To adopt appellant's reading of "chargeable" would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other—simply because of differences in what are essentially procedural rules. As in *United States* v. *Bagaric*, 706 F.2d 42, 62-63 (2 Cir.), *cert. denied*, 464 U.S. 840 (1983), we refuse to sanction such inconsistent results. Other courts' interpretations of § 1961(1)(A) support our interpretation of the statute. *See, e.g., United States* v. *Brown*, 555 F.2d 407, 418 n.22 (5 Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (rejecting Georgia's accomplice testimony corroboration requirement in a RICO prosecution); *United States* v. *Licavoli*, *supra*, 725 F.2d at 1047, and cases cited therein (even though Ohio law precludes separate punishment for conspiracy to

murder and murder, each can serve as separate predicate act in a RICO prosecution).

We hold that the district court correctly ruled that the New York corroboration of accomplice testimony requirement is not incorporated in a RICO prosecution.

V.

Officer Pecora of the Rochester police department was called as a government witness at trial. Pecora's testimony included relating his June 18, 1978 conversation with appellant Marotta. Pecora had relayed to Marotta a description of the "mob war" in the Rochester area, based on descriptions which two informants had provided. Pecora testified that he asked Marotta to comment on the informants' stories. Pecora then repeated in court Marotta's reaction to the informants' stories. Pecora's testimony also described appellants Russotti and Piccarreto as leaders of the organization. This hearsay testimony by Pecora on direct examination included the following:

> "Q. What else did you tell him?
>
> A. I also told Mr. Marotta that the first man stated that Sammy Gingello had declared himself over Samuel Russotti and Rene Piccarreto, and that there was no more equal power.
>
> I also told him that the man had stated to me that at approximately two weeks after the murder of Sammy Gingello that the A and the B team had a meeting, and it was suggested that this city be split into two parts with the river—or Main Street being the dividing line; that the A team found this accept-

able, but the B team did not, and was primarily opposed to Sonny Celestino, and nothing was resolved at this meeting.

The bombings continued, and—both the A and B team became disorganized. He also stated that the A team was losing its hold by not being effective in taking care of the B team. Also stated to—

. . . .

Q. What did you tell him the second man had stated to you?

A. The second man stated that in regards to the beating incident, that the whole problem would have ended with the beatings, but then the pipe bomb was found on Clifford Avenue and that started it all over again.

He stated that—the second man stated that the power structure of Samuel Gingello, Red Russotti and Rene Piccarreto was the same when they got out of jail as it was when they went to jail.

He also stated that the A team was suffering financially as a result of the bombings, and they were having difficulty—the A team was having difficulty—difficulty locating members of the B team.

He also stated that the problem would not be resolved unless at least these people are eliminated.

He also stated that members of the motorcycle club were probably the people that associated with Thomas Torpey.

After telling him these things, Mr. Marotta responded only by saying that he agreed with—with

the beatings, what happened in the beatings, but he said there was—he was not sure that exactly happened because he was in jail at the time.

He did say that—those members, those men, were told that—

. . . ."

The court first admitted the testimony tentatively, subject to later consideration. The court thereafter considered striking the testimony completely if Pecora did not disclose the identity of the informants. The court next decided to instruct the jury that the testimony was admissible against Marotta only. When Pecora was recalled for cross-examination, the court finally instructed the jury to disregard completely the controversial testimony of Pecora. Pecora refused to disclose the identity of the informants and was held in contempt.

Pecora appealed to this Court from the order holding him in civil contempt. We vacated the contempt order, holding that Pecora was not required to disclose the identity of the informants since the court had struck Pecora's testimony. *United States* v. *Russotti*, 746 F.2d 945, 950 (2 Cir. 1984). We observed that at that point in the trial the record did not establish such prejudice as to require a retrial because of the Pecora episode. *Id.* Our careful examination of the entire record, including events subsequent to Pecora's being held in contempt, satisfies us that nothing in the Pecora episode warrants disturbing the judgments of conviction.

Appellant Russotti, joined by several of the other appellants, argues that, even though the court struck the testimony eventually, its disclosure was so prejudicial as

to require a reversal. Appellants assert that the jury was left with the impression that the informants existed, that what they said was true, and that the officer's reliance on the unnamed informants gave the government's witnesses who were former members of the enterprise increased credibility.

Appellants rely on *Bruton* v. *United States*, 391 U.S. 123 (1968), for the proposition that their inability to cross-examine the sources of Pecora's testimony violated the confrontation clause. In *Bruton*, the jury had been asked to apply a confession obtained after arrest to the hearsay declarant but not to his co-defendant. The issue before us is whether the court's instruction to the jury to disregard completely the testimony relating to the June 18 conversation was sufficient to obviate any prejudice to appellants.

Appellants Russotti and Piccarreto claim particular prejudice because they were identified as leaders in the organization. Other witnesses, however, testified as to the conduct and leadership positions of these same appellants in the organization. We are satisfied that the claimed prejudice was not as "devastating" as appellants assert. Moreover, unlike the situation in *Bruton*, the jury was not asked to apply the testimony to only some appellants, nor were these hearsay declarations made "post-arrest".

While we do not applaud the sequence of events here, we are mindful that occasions do arise, particularly during the course of a long trial, where, on balance, it is in the interest of the fair administration of criminal justice that a jury be given corrective instructions. We hold that this is such a case. *See United States* v. *Nixon*, No. 85-1002, slip op. 6817, 6830-31 (2 Cir. Dec. 12, 1985).

The jury was not asked to perform olympian mental gymnastics. Indeed, the court's expression of grave concern over this testimony during the trial may well have redounded to the benefit of appellants because the court emphasized to the jury the importance of disregarding the testimony entirely.

We hold that the court's corrective instruction to the jury, together with the factors referred to above, obviated any prejudicial impact of Pecora's testimony upon any of the appellants. We hold that the court did not err in any respect in its handling of the Pecora episode, including its refusal to grant appellants' motion for a mistrial.

We believe it is appropriate and necessary to add a word of caution to the government. Preparation for and conduct during this long and somewhat complicated case no doubt were taxing on both the prosecution and defense counsel, as well as on the court. The government's proffer of Pecora's testimony, however, more resembled risk-creating improvisation than fine-tuned choreography. The government should have avoided this potential for prejudice by screening the testimony with appellants' counsel and the court before trial rather than plunging ahead with such hearsay testimony. After carefully reviewing the record, we believe that the government did not intentionally mishandle the proffer of Pecora's testimony. The scrutinizing trial judge abated the potential prejudice. He displayed the patience of Job and the wisdom of Solomon throughout. We nevertheless reiterate the admonition to government counsel which Judge Newman stated in one aspect of this very case, *United States* v. *Russotti*, *supra*, 746 F.2d at 950, except that we underscore that admonition. United States attorneys are charged with knowledge of the decisions of this Court in criminal cases. Any

disregard of our admonition in future cases will be dealt with appropriately.

VI.

Appellants have raised other subordinate claims of error which we do not believe merit discussion.

For example, appellants' claim that the inclusion of the 1973 Massaro murder as a predicate act violated the double jeopardy clause of the Fifth Amendment was rejected by us in an interlocutory appeal. *United States* v. *Russotti*, 717 F.2d 27 (2 Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). We hold that there is no reason to disturb that decision.

Other subordinate claims of error include whether the predicate acts under RICO were charged and proven adequately; whether the court abused its discretion in denying mid-trial requests for delay; whether the court properly excluded prior sworn testimony of two appellants; whether the court properly refused to allow appellant Marotta's attorney to be called as a witness; whether the government used immunized testimony in its prosecution; and whether consecutive sentences could be imposed for conspiracy and substantive violations of RICO.

We have carefully examined all claims of error raised by all appellants and we find none has merit.

VII.

To summarize: We hold that the admission of the co-conspirators' statements violated neither the requirements of Fed. R. Evid. 801(d)(2)(E) nor the confrontation

clause of the Sixth Amendment; the limited representation of a government witness by appellant Marotta's retained counsel did not violate Marotta's right to conflict-free counsel; appellants' argument that the New York corroboration of accomplice testimony requirement is incorporated in the RICO definition of racketeering activity is without merit; the court's limiting instruction to the jury was sufficient to obviate any prejudice resulting from Officer Pecora's hearsay statements; and all of appellants' other claims of error, having been carefully considered, are without merit.

Appellants were convicted after a two and one-half month trial on the basis of overwhelming evidence of extraordinarily serious offenses committed over a period of time beginning fifteen years ago. We order that the mandates issue forthwith.

Affirmed.

Orders Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of March one thousand nine hundred and eighty-six.

UNITED STATES OF AMERICA,
Appellee,

v.

RENE PICCARETO and SAMUEL J. RUSSOTTI,
Defendants-Appellants.

Docket No. 84-1470, 84-1471
84-1454(L)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendants-appellants, Rene Piccareto and Samuel J. Russotti

Upon reconsideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of March one thousand nine hundred and eighty-six

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UNITED STATES OF AMERICA,

Appellee,

v.

DONALD J. PAONE, ANTHONY M. COLOMBO, JOSEPH R. ROSSI, a/k/a "THE HOP", THOMAS E. MAROTTA, RICHARD J. MARINO, RENE PICCARRETO, SAMUEL J. RUSSOTTI, a/k/a "RED",

Defendants-Appellants.

Docket Nos. 84-1467, 84-1469
84-1454(L)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants—JOSEPH R. ROSSI and RICHARD J. MARINO

Upon reconsideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk